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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL A. RANDALL,

Defendant and Appellant.

D074217

(Super. Ct. No. SCD272210)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed as modified.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Michael Pulos, Deputy Attorney General, for Plaintiff and Respondent.

Michael A. Randall was sentenced to county jail for five years and eight months after a jury found him guilty of two counts of burglary (Pen. Code § 459).¹ The trial court imposed a \$3,000 felony restitution fine (§ 1202.4, subd. (b)), and imposed, but suspended, a \$3,000 parole, postrelease community supervision, or mandatory supervision revocation restitution fine (§ 1202.45).

Randall's appellate counsel filed a brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436, 441-443 (*Wende*) and requested that we review the record for error. To assist our review, counsel identified the following "claim" appearing in the appellate record: whether the trial court erred by refusing to impose a hybrid or split sentence consisting of county jail followed by a period of mandatory supervision.

Randall filed a one-page supplemental brief on his own behalf in which he alleged there was a "conflict of interest" that "need[ed] to be brought to someone [*sic*] attention."

Following our independent review of the record, we requested that the parties submit supplemental briefing addressing whether the trial court erred in imposing and suspending the \$3,000 revocation restitution fine. Because Randall was sentenced to county jail rather than prison, his sentence does not include a period of parole and he is not subject to postrelease community supervision. Further, the trial court committed Randall to county jail for a full term of custody, rather than imposing a hybrid or split sentence including a period of mandatory supervision. Therefore, we conclude, and all

¹ All further statutory references are to the Penal Code unless otherwise noted.

parties agree, that the trial court erred in imposing a parole, postrelease community supervision, or mandatory supervision revocation restitution fine under section 1202.45.

We strike the revocation restitution fine imposed pursuant to section 1202.45, and affirm the judgment as modified.

I

FACTUAL AND PROCEDURAL BACKGROUND

On October 14, 2016, police responded to a report of a break-in at a restaurant that had occurred the prior evening. At the scene of the break-in, police discovered a shattered glass door, a rock that appeared to have been used to break the glass door, a cash register drawer on the floor, and a missing vending machine. Police collected the rock, tested it for biological fluids, and determined that the DNA of three individuals was present on the rock. Using a reference swab obtained from Randall, a police criminalist determined that 79 percent of the DNA on the rock belonged to Randall.

One month later, police responded to a report of a break-in at another restaurant. Once again, police believed that an intruder had entered the restaurant by breaking a glass door with a rock that was found inside the restaurant. Police collected the rock, tested it for biological fluids, and determined that the DNA of three individuals was present on the rock. Using a reference swab obtained from Randall, a police criminalist determined that 67 percent of the DNA on the rock belonged to Randall.

Randall was arrested, charged, and found guilty by a jury of two counts of second degree burglary for the break-ins discussed *ante*.² He admitted two prior felony convictions and the trial court sentenced him to an aggregate term of five years and eight months, calculated as follows: the upper term of three years for the first burglary conviction, plus eight months consecutive for the second burglary conviction (one-third the middle term), plus one year for each of the two prison priors (§§ 667.5, subd. (b), 668). The court denied probation, finding that Randall's prior performance on probation and parole had not been satisfactory. Finally, the court found that Randall was eligible for sentencing under section 1170, subdivision (h)(5), but declined to impose a split sentence because "the manner in which the crimes were carried out indicate[d] planning."

The trial court imposed a \$3,000 felony restitution fine pursuant to section 1202.4, subdivision (b). An amended abstract of judgment and amended sentencing minutes filed with this court reflect that the trial court also imposed, but suspended, a \$3,000 revocation restitution fine pursuant to section 1202.45.

² The jury was unable to reach a verdict on two additional counts of burglary and one count of grand theft of personal property arising from separate incidents.

II

DISCUSSION

A. Section 1202.45 Revocation Restitution Fine

As noted, we requested supplemental briefing from the parties addressing whether the trial court erred in imposing and suspending a \$3,000 revocation restitution fine under section 1202.45. Two provisions of section 1202.45 are relevant to answer this question.

In any case in which a person has been convicted of a crime and his or her sentence includes a period of parole, subdivision (a) of section 1202.45 requires a court to impose a parole revocation restitution fine equal to the amount of the felony restitution fine imposed under section 1202.4.³ As the language of section 1202.45 makes clear, the parole revocation restitution fine may "only [be] imposed in a 'case' where a sentence has been imposed which includes a 'period of parole.'" (*People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1183.) In this case, Randall was sentenced to county jail, not prison, and therefore is not subject to parole. (*People v. Cruz* (2012) 207 Cal.App.4th 664, 671-672.) As all parties agree, this fact precludes imposition of a parole revocation restitution fine. (*Id.* at fn. 6; *People v. Butler* (2016) 243 Cal.App.4th 1346, 1350-1351.)

Under the second relevant provision of section 1202.45, a court must impose a revocation restitution fine equal to the amount of the section 1202.4 felony restitution fine in any case in which a person has been convicted of a crime and is subject to either postrelease community supervision under section 3451 or mandatory supervision under

³ The parole revocation restitution fine is automatically suspended, unless the court revokes the defendant's parole. (§ 1202.45, subd. (c).)

section 1170, subdivision (h)(5).⁴ (§ 1202.45, subd. (b).) Here, however, Randall was not subject to postrelease community supervision under section 3451 because he was sentenced to county jail and section 3451, by its terms, "relates only to inmates released from prison." (*Butler, supra*, 243 Cal.App.4th at pp. 1351-1352.) Further, the court committed Randall to county jail for a full term of custody, rather than imposing a hybrid or split sentence under which he might otherwise have been released into the community under mandatory supervision for a portion of his sentence. Accordingly, as all parties agree, no postrelease community supervision or mandatory supervision revocation restitution fine was warranted. (*Id.* at p. 1352.)

Because there was no basis for a parole, postrelease community supervision, or mandatory supervision revocation restitution fine, the \$3,000 revocation restitution fine is stricken.

B. *Conflict of Interest*

Randall filed a supplemental brief on his own behalf in which he argued, without further discussion, that there was a "conflict of interest" that "need[ed] to be brought to someone [*sic*] attention." Randall cited several excerpts of the clerk's transcript, only one of which appears to have possible relevance to his claim of a conflict of interest.

The pertinent excerpt of the clerk's transcript and corresponding reporter's transcript indicate that a court operations manager testified, outside the presence of the

⁴ The postrelease community supervision and mandatory supervision revocation restitution fines are automatically suspended unless the person's postrelease community supervision or mandatory supervision is revoked. (§ 1202.45, subd. (c).)

jury, that she had received an inquiry from a deputy district attorney regarding potential misconduct by a member of the jury in Randall's case. The juror, who was a friend of the deputy district attorney, informed the deputy district attorney that he had been placed on a jury, wanted to know how a jury reaches a consensus, and had a question about voir dire. The juror did not disclose information or facts about the case and the deputy district attorney immediately informed the juror that they should not discuss such matters. The trial court found that this colloquy did not constitute improper misconduct. We agree.

A juror may not "conduct research, disseminate information, or converse with, or permit themselves to be addressed by, any other person *on any subject of the trial . . .*" (§ 611 [italics added].) However, the juror in this case did not reveal any facts pertaining to the case. Furthermore, the deputy district attorney with whom the juror spoke immediately halted the conversation at issue. Given that the subject matter of the trial was never discussed, the trial court correctly declined to find prejudicial misconduct. (*People v. Linton* (2013) 56 Cal.4th 1146, 1194-1195 [no misconduct where wife "vented" to husband about case, but did not disclose "facts or events related to the case"]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1309 [no prejudicial misconduct where wife conversed with husband about the manner by which the jury picked a foreperson but disclosed "nothing substantive"].) Accordingly, we find no merit to Randall's claim of a "conflict of interest."

C. Conclusion

Our review of the record pursuant to *Wende, supra*, 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, including the issue identified by counsel, has disclosed

no other reasonably arguable appellate issue. Randall has been adequately represented by counsel on this appeal.

III

DISPOSITION

The judgment is modified to strike the revocation restitution fine imposed under Penal Code section 1202.45. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the San Diego County Sheriff's Department. As modified, the judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.